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ViSalus, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

LORI WAKEFIELD, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

VISALUS, INC., a Nevada corporation,

Defendant.

No. CV No. 3:15-cv-01857-BR

**NOTICE OF FILING FCC ORDER
GRANTING WAIVER TO DEFENDANT;
REQUEST FOR JUDICIAL NOTICE; AND
REQUEST FOR STATUS CONFERENCE**

Notice of FCC Order Granting Waiver to Defendant; Request for Judicial Notice; and Request for Status Conference

Defendant, ViSalus, Inc. ("ViSalus"), gives notice of filing the FCC Order granting waiver to ViSalus, and pursuant to Rule 201 Federal Rules of Evidence, requests that the Court take judicial notice of that Order.

The Court will recall both from previous briefing and from the briefing and argument on Plaintiff's request for enhanced damages that ViSalus obtained consents from its promoters and customers. However, in 2012, and effective October 16, 2013, the FCC promulgated new rules regarding the form of consent and disclosures required under the TCPA. Although the customers and promoters provided consents to ViSalus, they did not meet the technical requirements of the FCC's new rules. Accordingly, on September 14, 2017, ViSalus petitioned the FCC for a waiver of the new consent requirements (the "Petition") under the FCC protocols. (Dkt. 296, Defendant's Opening Brief Regarding Willfulness and Enhanced Damages, Exhibit "A" thereto).

Yesterday, June 13, 2019, the FCC approved ViSalus's Petition and granted ViSalus "retroactive waivers [of the consent rules] to calls made on or before October 7, 2015." A copy of the FCC's Order granting ViSalus's Petition (the "Order") is attached as Exhibit "A". ViSalus requests that the Court take judicial notice of and consider the Order when ruling on Plaintiff's request for enhanced damages. The Order further demonstrates that enhanced damages are not warranted in this case. ViSalus had consent to call Plaintiff and the members of the class which – until yesterday – were in a form that did not meet the technical requirements of the FCC's changed regulations. The Order not only reaffirms that ViSalus's conduct was not the type which warrants enhanced damages, but also now demonstrates that ViSalus did not violate the TCPA in the manner Plaintiff claims.

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The Order obviously has implications for other matters before the Court and issues central to the case, including class certification, new trial, and others. ViSalus will supplement its submissions for the Court on those issues in the near future and as the Court specifies. However, given that the Order was just issued and that the Court has not yet ruled on enhanced damages, ViSalus has submitted the Order immediately to the Court so it may give it due consideration as the Court further considers the issue.

ViSalus also requests that the Court set a status conference to allow the parties to discuss with the Court their respective views on the impact of the Order on the case.

Notice of FCC Order Granting Waiver to Defendant; Request for Judicial Notice; and Request for Status Conference

DATED this 14th day of June, 2019.

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By /s/John Maston O'Neal

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I hereby certify that I served the foregoing on Plaintiff the foregoing document:

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by the following indicated method or methods on the date set forth below:

- CM/ECF system transmission.**
- E-mail.** As required by Local Rule 5.2, any interrogatories, requests for production, or requests for admission were e-mailed in Word or WordPerfect format, not in PDF, unless otherwise agreed to by the parties.
- Facsimile communication device.**
- First-class mail, postage prepaid.**
- Hand-delivery.**
- Overnight courier, delivery prepaid.**

DATED this 14th day of June 2019,

/s/John Maston O'Neal

Attorneys for Defendant ViSalus, Inc.